

CITATION
THE STATE OF TEXAS

TO: **Land Gorilla, LLC**
By Serving Registered Agent: United States Corporation Agents, Inc.
9900 Spectrum Drive, Austin, Texas

Defendant Greetings:

NOTICE

You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation by 10 o'clock a.m. on the Monday following the expiration of 20 (twenty) days after you have been served this citation and First Amended Petition, a default judgment may be taken against you.

Said **Plaintiff's First Amended Petition** was filed in the **99th District Court** of Lubbock County, Texas, on **January 22, 2019**. The file number of said suit being Cause Number **2018532364**, and styled:

Siwell, Inc., d/b/a Capital Mortgage Services of Texas,

Plaintiff

V.

William Berthelette and Land Gorilla, LLC,

Defendants

The nature of **Plaintiff's** demand is set out and shown by a true and correct copy of the **First Amended Petition**, accompanying this citation, and made a part thereof.

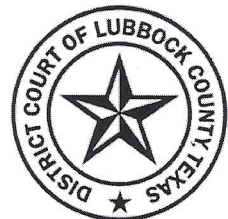
Plaintiff is represented by:

Keith C. Thompson, 11003 Quaker Avenue, Lubbock, TX 79424 (806)783-8322

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates hereof, and make due return as the law directs.

Issued and given under my hand and seal of said Court at Lubbock County, Texas, this Tuesday, January 22, 2019, at 3:26 PM.

Barbara Sucsy, District Clerk
99th District Court
P.O. Box 10536 (79408)
904 Broadway
Lubbock, Texas 79401



By

Jamie Horton

Jamie Horton

Deputy

CAUSE NUMBER 2018532364

TB

SIWELL, INC. D/B/A CAPITAL MORTGAGE	§	IN THE 99 TH DISTRICT COURT
SERVICES OF TEXAS	§	
<i>PLAINTIFF</i>	§	
V.	§	OF
	§	
WILLIAM BERTHELETTE AND	§	
LAND GORILLA, LLC	§	
<i>DEFENDANT</i>	§	LUBBOCK COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED PETITION

To the Honorable Judge of Said Court:

Now Comes, SIWELL, INC. D/B/A CAPITAL MORTGAGE SERVICES OF TEXAS, in the above numbered and styled cause and amends Plaintiff's Original Petition, complaining of WILLIAM BERTHELETTE AND LAND GORILLA, LLC, and would respectfully show the Court as follows:

I. PARTIES AND VENUE

1. PLAINTIFF, SIWELL, INC., D/B/A CAPITAL MORTGAGE SERVICES OF TEXAS ("CMS") is a Texas, for-profit corporation in good standing which conducts business in Lubbock, Texas.
2. DEFENDANT, WILLIAM BERTHELETTE, ("BERTHELETTE") is an individual who may be served with service at 2473 Lake Road, Ridgeway, SC 29130.
3. DEFENDANT, LAND GORILLA, LLC ("LAND GORILLA") is a foreign limited liability company doing business in the State of Texas, and is in good standing. LAND GORILLA may be served with service by and through their Registered Agent, United States Corporation Agents, Inc., 9900 Spectrum Drive, Austin, Texas 78717.
3. Venue is proper in Lubbock County because a substantial part of the events or omissions giving rise to the claim occurred in Lubbock County, Texas.

II. DISCOVERY CONTROL PLAN

4. Discovery in this case will be conducted pursuant to Rule 190.2 of the Texas Rules of Civil Procedure (Level 2).

III. RELIEF AND EXPEDITED ACTION

5. CMS seeks only monetary relief of \$100,000 or less, including damages of any kind, penalties, court costs, expenses, prejudgment interest, post-judgment interest, and attorney fees. Tex. R. Civ. P. § 47(c)(1).

6. Pursuant to Tex. R. Civ. P. §§ 47 and 169, this lawsuit is an Expedited Action.

IV. FACTS

7. On July 14, 2017, CMS hired BERTHELETTE as a contractor in the position of National Director of Retail Sales. BERTHELETTE executed an Engagement Agreement upon his acceptance of the position with Plaintiff on July 14, 2017. Engagement Agreement attached as Exhibit "A". Plaintiff provided good and adequate consideration and agreed to provide BERTHELETTE with a generous salary, as well as other benefits. However, during his tenure with CMS, BERTHELETTE also took on a position with LAND GORILLA, LLC (hereinafter known as "LAND GORILLA") and was working for both entities at the same time without the knowledge of the Plaintiff. Defendants collaborated and conspired together for their own personal gain and persuaded CMS to use the services of LAND GORILLA. Defendants thereby wrongfully capitalized upon the Plaintiff and failed to disclose the business relationship between BERTHELETTE and LAND GORILLA.

8. Further, Defendants improperly used CMS resources for their own personal financial gain and for the benefit of LAND GORILLA.

V. UNJUST ENRICHMENT

9. Based on information and belief, Defendants derived a financial benefit from having CMS sign on and obtain services from LAND GORILLA. Defendants were unjustly enriched when CMS agreed to obtain services from LAND GORILLA at the prompting of BERTHELETTE.

VI. NEGLIGENT MISREPRESENTATION/ FRAUD

10. The Defendants violated the duty owed to the Plaintiff to exercise the ordinary care and diligence exercised by other professionals in the same or similar circumstances and were negligent in the misrepresentation of their business relationship and connection to each other. Defendants intentionally failed to disclose this information to CMS and continued to capitalize on CMS by promoting LAND GORILLA, LLC's services to CMS and enticing CMS to do business with LAND GORILLA. ["Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally]. Actual fraud involves a material misrepresentation, made either intentionally or recklessly, that was intended to be acted on, that was in fact relied on, that caused injury.

VII. BREACH OF FIDUCIARY DUTY

11. In the alternative to other counts, Plaintiff pleads for recovery under breach of fiduciary duty. BERTHELETTE, while an agent and fiduciary of CMS, collaborated with LAND GORILLA, using CMS resources and time for their personal gain.

VIII. FRAUDULENT INDUCEMENT/ DETRIMENTAL RELIANCE

12. Defendants made material representations to Plaintiff in relation to the services offered by LAND GORILLA, LLC. The representations were false. At the time Defendants made the representations Defendants knew the representations were false. Defendants made the representations with the intent that Plaintiff act on the representations, Plaintiff did act on the representations and the representation has caused the Plaintiff injury.

IX. BREACH OF CONTRACT

13. Plaintiff would show that BERTHELETTE has breached his contract with Plaintiff, specifically as set out as grounds for cause of termination in Paragraph 9 of the Engagement Agreement, to wit:

“3). If Contractor shall breach any of the duties usually and customarily owed by a Contractor to employer including but not limited to misappropriation of funds or property, attempting to secure any personal profit not fairly disclosed to Capital Mortgage, neglect of duties undertaken by Contractor hereunder or engaging in conduct, publicly or privately, that is materially adverse to the interest of Capital Mortgage in the sole discretion of the officers of Capital Mortgage.

“4) If Contractor is engaged in self-dealing whereby profits are redirected from Capital Mortgage to personally benefit Contractor.”

X. DAMAGES

14. As a direct and proximate result of the Defendants' misrepresentations and as set forth above, Plaintiff has suffered a substantial financial loss. Furthermore, the nature of Defendants' conduct subjects them to the imposition of punitive damages.

XI. REQUEST FOR DISCLOSURE

15. Pursuant to Rule 194 of the Texas Rules of Civil Procedure you are requested to disclose, within 50 days of service of this request, the information or material described in Rule 194.2.

XII. PRAYER

16. For these reasons, CMS asks the court to issue citation for WILLIAM BERTHELETTE AND LAND GORILLA, LLC to appear and answer, and that CMS be awarded judgment against Defendants for the following:

- a. Actual damages;
- b. Prejudgment interest and post-judgment interest as provided by law;
- c. Unliquidated damages;
- d. Costs of suit;
- e. Attorney's fees pursuant to Tex. Civ. Prac. & Rem. Code §38.002; and
- f. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully Submitted,

The Law Office of Keith C. Thompson, P.C.
11003 Quaker Avenue
Lubbock, Texas 79424
(806) 783-8322 (Telephone)
(806) 783-8357 (Telecopier)
SBN: 24013631
kct@kctlaw.us

/s/Keith C. Thompson

Keith C. Thompson
Attorney for Plaintiff

Case Information

SIWELL, INC. D/B/A CAPITAL M vs.
BERTHELETTE, WILLIAM

2018532364

Location

Lubbock County - 99th District
Court

Case Category

Civil - Contract

Case Type

Debt/Contract -
Fraud/Misrepresentation

Case Status

Open

Parties³

Type	Name	Attorneys
Plaintiff	SIWELL, INC. D/B/A CAPITAL M ▾	KEITH THOMPSON ▾
Defendant	WILLIAM BERTHELETTE ▾	
Defendant	LAND GORILLA, LLC ▾	

Filings⁵

Newest First

Search in Filings



RQST - Request

File Date

1/22/2019

CIVIL PROCESS REQUEST - Capital Mortgage v. Berthelette and Land Gorilla

Name	Description	Security	Pages	Price	
1.21.19 Civil Process Request Form.pdf	1.21.19 Civil Process Request Form.pdf	Does not contain sensitive data	2	\$0.20	Available until 3/11/19

APLD - Amended Pleading

File Date

1/22/2019

Plaintiff's First Amended Petition - Capital Mortgage v. Berthelette and Land Gorilla

Name	Description	Security	Pages	Price	
1.18.19 Plaintiff's First Amended Petition.pdf	1.18.19 Plaintiff's First Amended Petition.pdf	Does not contain sensitive data	6	\$0.60	+ ADD

RQST - Request

File Date

9/25/2018

Civil Process Request Form - CMS v. Berthelette

Name	Description	Security	Pages	Price	
9.25.18 Civil Process Request Form.pdf	9.25.18 Civil Process Request Form.pdf	Does not contain sensitive data	2	\$0.20	+ ADD

INSH - Case Information Sheet

File Date
9/25/2018

Case Information Sheet - CMS v. Berthelette

Name	Description	Security	Pages	Price	
9.25.18 Civil Case Information Sheet.pdf	9.25.18 Civil Case Information Sheet.pdf	Does not contain sensitive data	1	\$0.10	+ ADD

PETN - Petition Filed

File Date
9/25/2018

Plaintiff's Original Petition - CMS v. Berthelette

Name	Description	Security	Pages	Price	
9.25.18 Plaintiff's Original Petition [Final].pdf	9.25.18 Plaintiff's Original Petition [Final].pdf	Does not contain sensitive data	14	\$1.40	Available until 2/25/19

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Version: 2019.0.0.2691





Demand for Arbitration Form

Instructions for Submittal of Arbitration to JAMS

INSTRUCTIONS

Please submit this form to your local JAMS Resolution Center. Once the below items are received, a JAMS professional will contact all parties to commence and coordinate the arbitration process, including the appointment of an arbitrator and scheduling a hearing date.

☎ 1-800-352-JAMS
 🌐 www.jamsadr.com

If you wish to proceed with an arbitration by executing and serving a Demand for Arbitration on the appropriate party, please submit the following items to JAMS with the requested number of copies:

A. Demand for Arbitration (2 copies)

B. Proof of service of the Demand on the appropriate party (2 copies)

C. Entire contract containing the arbitration clause (2 copies)

- To the extent there are any court orders or stipulations relevant to this arbitration demand, e.g. an order compelling arbitration, please also include two copies.

D. Administrative Fees

- For two-party matters, the Filing Fee is \$1,500. For matters involving three or more parties, the filing fee is \$2,000. The entire Filing Fee must be paid in full to expedite the commencement of the proceedings. Thereafter, a Case Management Fee of 12% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation. JAMS also charges a \$1,500 filing fee for counterclaims. For matters involving consumers, the consumer is only required to pay \$250. See JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses. For matters based on a clause or agreement that is required as a condition of employment, the employee is only required to pay \$400. See JAMS Policy on Employment Arbitrations, Minimum Standards of Fairness.
- A refund of \$600 will be issued if the matter is withdrawn within five days of filing. After five days, the filing fee is non-refundable.

Once completed, please submit to your local JAMS Resolution Center.

Resolution Center locations can be found on the JAMS website at: <http://www.jamsadr.com/locations/>.



Demand for Arbitration Form (continued)

Instructions for Submittal of Arbitration to JAMS

TO RESPONDENT (PARTY ON WHOM DEMAND FOR ARBITRATION IS MADE)

Add more respondents on page 6

RESPONDENT NAME **SiWell, Inc., dba Capital Mortgage Services of Texas**

ADDRESS **4212 50th Street**

CITY **Lubbock**

STATE **TX**

ZIP **79413**

PHONE **806-796-7231** FAX **806-791-5403** EMAIL **royce@capitalmort.com**

RESPONDENT'S REPRESENTATIVE OR ATTORNEY (IF KNOWN)

REPRESENTATIVE/ATTORNEY **Keith C. Thompson**

FIRM/COMPANY **The Law Office of Keith C. Thompson, P.C.**

ADDRESS **11003 Quaker Avenue**

CITY **Lubbock**

STATE **TX**

ZIP **79424**

PHONE **806-783-8322** FAX **806-783-8357** EMAIL **kct@cktlaw.us**

FROM CLAIMANT

Add more claimants on page 7

CLAIMANT NAME **Land Gorilla, LLC**

ADDRESS **1241 Johnson Avenue, #154**

CITY **San Luis Obispo**

STATE **CA**

ZIP **93401**

PHONE **805-242-5847** FAX EMAIL **SFarries@landgorilla.com**

CLAIMANT'S REPRESENTATIVE OR ATTORNEY (IF KNOWN)

REPRESENTATIVE/ATTORNEY **Linda Somers Smith**

FIRM/COMPANY **Adamski Moroski Madden Cumberland & Green LLP**

ADDRESS **6633 Bay Laurel Place**

CITY **Avila Beach**

STATE **CA**

ZIP **93403**

PHONE **805-543-0990** FAX **805-543-0980** EMAIL **lss@ammcglaw.com**



Demand for Arbitration Form (continued)

Instructions for Submittal of Arbitration to JAMS

MEDIATION IN ADVANCE OF THE ARBITRATION

☐

If mediation in advance of the arbitration is desired, please check here and a JAMS Case Manager will assist the parties in coordinating a mediation session.

NATURE OF DISPUTE / CLAIMS & RELIEF SOUGHT BY CLAIMANT

CLAIMANT HEREBY DEMANDS THAT YOU SUBMIT THE FOLLOWING DISPUTE TO FINAL AND BINDING ARBITRATION.
A MORE DETAILED STATEMENT OF CLAIMS MAY BE ATTACHED IF NEEDED.

By this demand, Land Gorilla, LLC, a Delaware limited liability company ("Land Gorilla"), as Claimant, hereby invokes mandatory arbitration for dispute resolution contained at Section 10.3 of the Master Services Agreement between Land Gorilla and Respondent SiWell, Inc., dba, Capital Mortgage Services of Texas ("Capital Mortgage"), dated September 27, 2017 ("MSA") - see below, and attached.

The dispute is based on breach of contract by Respondent in failing to pay service fees, other contractual fees due and payable, and refusal to honor and pay for services pursuant to the exclusive contracting provision for inspection services fee per the MSA, together with, costs and attorneys fees and other damages subject to proof. To date, the MSA continues and has not been terminated by Respondent.

In addition to service fees due and payable and inspection fee services and associated revenue to be paid, which revenue will be based on amount of such services which were to be procured through Land Gorilla on an exclusive basis, Land Gorilla also demands attorneys fees and costs associated with the breach. The total claimed as of filing at the least exceeds \$250,000 and will continue to increase for the remainder of the 24 month contract.

AMOUNT IN CONTROVERSY (US DOLLARS)

exceeds \$250,000



Demand for Arbitration Form (continued)

Instructions for Submittal of Arbitration to JAMS

ARBITRATION AGREEMENT

This demand is made pursuant to the arbitration agreement which the parties made as follows. *Please cite location of arbitration provision and attach two copies of entire agreement.*

ARBITRATION PROVISION LOCATION

Section 10.3 of the MSA (two copies are attached of the entire agreement) provides:

"10.3 Arbitration. All disputes arising under or in connection with this Agreement shall be submitted to Judicial Arbitration and Mediation Services, Inc. (JAMS) or successor organization for binding arbitration serving San Luis Obispo County by a single arbitrator who shall be a former California Superior Court judge. The arbitrator shall be selected by JAMS in an impartial manner determined by it. Except as may be otherwise provided herein, the arbitration shall be conducted under the California Arbitration Act, Code of Civil Procedure § 1280 et seq. The Parties shall have the discovery rights provided in Code of Civil Procedure § 1283.05 and 1283.]. The arbitration hearing will be commenced within one-hundred eighty (180) days of the filing of this application with JAMS by any party hereto, and a decision shall be rendered by the arbitrator within thirty (30) days of the conclusion of the hearing. The arbitrator shall have complete authority to render any and all relief, legal and equitable, appropriate under California law and this Order. The arbitrator shall award costs of the proceeding, including reasonable attorney's fees, to the Party determined to have substantially prevailed. Notwithstanding the foregoing, either party may seek equitable relief to enforce the provision of Section 6."

RESPONSE

The respondent may file a response and counter-claim to the above-stated claim according to the applicable arbitration rules. *Send the original response and counter-claim to the claimant at the address stated above with two copies to JAMS.*

REQUEST FOR HEARING

REQUESTED LOCATION San Luis Obispo California per agreement

ELECTION FOR EXPEDITED PROCEDURES (IF COMPREHENSIVE RULES APPLY)

See: Comprehensive Rule 16.1



By checking the box to the left, Claimant requests that the Expedited Procedures described in JAMS Comprehensive Rules 16.1 and 16.2 be applied in this matter. Respondent shall indicate not later than seven (7) days from the date this Demand is served whether it agrees to the Expedited Procedures.

SUBMISSION INFORMATION

SIGNATURE

DATE 02/06/2019

NAME
(PRINT/TYPED)

Linda Somers Smith



Demand for Arbitration Form (continued)

Instructions for Submittal of Arbitration to JAMS

Completion of this section is required for all consumer or employment claims.

CONSUMER AND EMPLOYMENT ARBITRATION

Please indicate if this is a CONSUMER ARBITRATION. For purposes of this designation, and whether this case will be administered in California or elsewhere, JAMS is guided by California Rules of Court Ethics Standards for Neutral Arbitrators, Standard 2(d) and (e), as defined below, and the JAMS Consumer and Employment Minimum Standards of Procedural Fairness:

☐ **YES**, this is a CONSUMER ARBITRATION.

☒ **NO**, this is not a CONSUMER ARBITRATION.

"Consumer arbitration" means an arbitration conducted under a pre-dispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below. "Consumer arbitration" excludes arbitration proceedings conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.

1. The contract is with a consumer party, as defined in these standards;
2. The contract was drafted by or on behalf of the non-consumer party; and
3. The consumer party was required to accept the arbitration provision in the contract.

"Consumer party" is a party to an arbitration agreement who, in the context of that arbitration agreement, is any of the following:

1. An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code;
2. An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code;
3. An individual with a medical malpractice claim that is subject to the arbitration agreement; or
4. An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

In addition, JAMS is guided by its Consumer Minimum Standards and Employment Minimum Standards when determining whether a matter is a consumer matter.

If Respondent disagrees with the assertion of Claimant regarding whether this IS or IS NOT a CONSUMER ARBITRATION, Respondent should communicate this objection in writing to the JAMS Case Manager and Claimant within seven (7) calendar days of service of the Demand for Arbitration.

EMPLOYMENT MATTERS

If this is an EMPLOYMENT matter, Claimant must complete the following information:

Private arbitration companies are required to collect and publish certain information at least quarterly, and make it available to the public in a computer-searchable format. In employment cases, this includes the amount of the employee's annual wage. The employee's name will not appear in the database, but the employer's name will be published. Please check the applicable box below:

☐ Less than \$100,000 ☐ \$100,000 to \$250,000 ☐ More than \$250,000 ☐ Decline to State

WAIVER OF ARBITRATION FEES

In certain states (e.g. California), the law provides that consumers (as defined above) with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of the arbitration fees. In those cases, the respondent must pay 100% of the fees. Consumers must submit a declaration under oath stating the consumer's monthly income and the number of persons living in his or her household. Please contact JAMS at 1-800-352-5267 for further information. Note: this requirement is not applicable in all states.



Demand for Arbitration Form (continued)

Instructions for Submittal of Arbitration to JAMS

RESPONDENT #2 (PARTY ON WHOM DEMAND FOR ARBITRATION IS MADE)

RESPONDENT
NAME

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL

RESPONDENT'S REPRESENTATIVE OR ATTORNEY (IF KNOWN)

REPRESENTATIVE/ATTORNEY

FIRM/
COMPANY

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL

RESPONDENT #3 (PARTY ON WHOM DEMAND FOR ARBITRATION IS MADE)

RESPONDENT
NAME

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL

RESPONDENT'S REPRESENTATIVE OR ATTORNEY (IF KNOWN)

REPRESENTATIVE/ATTORNEY

FIRM/
COMPANY

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL



Demand for Arbitration Form (continued)

Instructions for Submittal of Arbitration to JAMS

CLAIMANT #2

CLAIMANT
NAME

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL

CLAIMANT'S REPRESENTATIVE OR ATTORNEY (IF KNOWN)

REPRESENTATIVE/ATTORNEY

FIRM/
COMPANY

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL

CLAIMANT #3

CLAIMANT
NAME

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

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CLAIMANT'S REPRESENTATIVE OR ATTORNEY (IF KNOWN)

REPRESENTATIVE/ATTORNEY

FIRM/
COMPANY

ADDRESS

CITY

STATE

ZIP

PHONE

FAX

EMAIL

PROOF OF SERVICE
(Code Civ. Proc., §§1013, et seq., 1010.6, and 2015.5)

I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 and not a party to this action. My business address is Post Office Box 3835, San Luis Obispo, CA 93403-3835. Hand and overnight deliveries should be directed to our physical location at 6633 Bay Laurel Place, Avila Beach, CA 93424.

On February 6, 2019, I served the following document titled **"JAMS Arbitration Demand"** on the parties identified on the attached Service List.

☒ **BY U.S. MAIL** – I caused the above-described document to be deposited in the regular course of business in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the U.S. Postal Service, at a place located within the county of San Luis Obispo, in a sealed envelope, with postage fully prepaid, addressed to the person(s) on whom it is to be served, at the address(es) shown on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this day in San Luis Obispo County, California.

Dated: February 6, 2019



Jennifer A. Cabreros

SERVICE LIST

SiWell, Inc., dba Capital Mortgage Services of Texas

4212 50th Street

Lubbock, TX 79413

Keith C. Thompson

The Law Office of Keith C. Thompson, P.C.

11003 Quaker Avenue

Lubbock, TX 79424

CAUSE NUMBER 2018532364**MK**SIWELL, INC. D/B/A CAPITAL MORTGAGE
SERVICES OF TEXAS
PLAINTIFF

V.

WILLIAM BERTHELETTE
DEFENDANT§ IN THE DISTRICT COURT NO. _____
§
§
§ OF
§
§
§
§ LUBBOCK, TEXAS

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Judge of Said Court:

Now Comes, SIWELL, INC. D/B/A CAPITAL MORTGAGE SERVICES OF TEXAS, in the above numbered and styled cause, complaining of WILLIAM BERTHELETTE, and would respectfully show the Court as follows:

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8. Further, Defendant improperly used CMS resources for his own personal financial gain and for the benefit of Land Gorilla.

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representations with the intent that Plaintiff act on the representations, Plaintiff did act on the representations and the representation has caused the Plaintiff injury.

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“4) If Contractor is engaged in self-dealing whereby profits are redirected from Capital Mortgage to personally benefit Contractor.”

X. DAMAGES

14. As a direct and proximate result of the Defendant’s misrepresentations and as set forth above, Plaintiff has suffered a substantial financial loss. Furthermore, the nature of Defendant’s conduct subjects them to the imposition of punitive damages.

XI. REQUEST FOR DISCLOSURE

15. Pursuant to Rule 194 of the Texas Rules of Civil Procedure you are requested to disclose, within 50 days of service of this request, the information or material described in Rule 194.2.

XII. PRAYER

16. For these reasons, CMS asks the court to issue citation for WILLIAM BERTHELETTE to appear and answer, and that CMS be awarded judgment against WILLIAM BERTHELETTE for the following:

- a. Actual damages;
- b. Prejudgment interest and post-judgment interest as provided by law;
- c. Unliquidated damages;
- d. Costs of suit;
- e. Attorney's fees pursuant to Tex. Civ. Prac. & Rem. Code §38.002; and
- f. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully Submitted,

The Law Office of Keith C. Thompson, P.C.
11003 Quaker Avenue
Lubbock, Texas 79424
(806) 783-8322 (Telephone)
(806) 783-8357 (Telecopier)
SBN: 24013631
kct@kctlaw.us

/s/Keith C. Thompson

Keith C. Thompson
Attorney for Plaintiff

EXHIBIT “A”

LG-024

STATE OF TEXAS

§

COUNTY OF LUBBOCK

§

ENGAGEMENT AGREEMENT

§

This Engagement Agreement is made by and between Siwell Inc., d/b/a Capital Mortgage Services of Texas, a Texas corporation ("Capital Mortgage") and Louis William (Bill) Berthelette, an employee of Regenesis, LLC, ("Contractor") for the purposes and consideration hereinafter expressed.

Capital Mortgage is in the business of originating, placing, selling, and servicing mortgage loans of various sizes. It desires to employ Regenesis LLC, pursuant to the terms and conditions hereinafter set forth. Contractor desires an engagement and/or continued engagement pursuant to such terms and conditions.

Accordingly, in consideration of the mutual benefits, covenants and undertakings hereinafter set forth, Capital Mortgage and Contractor do hereby agree as follows:

1. **Term of Engagement/Effective Date.** Capital Mortgage hereby employs Contractor and Contractor hereby accepts engagement with Capital Mortgage with an Effective date of the 1st day of August, 2017, and continuing for the 12 months thereafter. It is agreed by the parties hereto that compensation as described in paragraph Three (3) herein shall be examined on or before each anniversary of engagement and changes to Contractor's compensation may be made periodically, based on cost of living and/or merit and performance according to the established practices of Capital Mortgage. This engagement period shall be automatically extended at maturity on each anniversary for an unlimited number of additional 12 months periods provided the engagement period is not shortened pursuant to this Agreement as hereinafter set forth.

2. **Position.** On the Effective Date as described in the preceding paragraph, Contractor shall be duly titled as National Director of Retail Sales, with all of the authority, duties, responsibilities, and privileges which are incumbent thereto. Contractor agrees to exercise his best efforts to assume and faithfully perform the said duties and responsibilities of this corporate position.

3. **Duties of Contractor.** Contractor shall strive to perform the mortgage services of Capital Mortgage and to perform as National Director of Retail Sales Contractor agrees that he will adopt and maintain a standard minimum of 40 hours per workweek on behalf of Capital Mortgage by being present and/or engaged in the course and scope of engagement during Capital Mortgage's established office hours of 8:30 a.m. to 5 p.m., Monday through Friday of each week. Contractor further agrees to discharge faithfully, diligently and to the best of his ability during the entire period of engagement by Capital Mortgage, his assigned duties as Capital Mortgage may request from time to time. The assignment of specific duties shall be at all times at the discretion

Engagement Agreement - Berthelette
Page 2 of 5

of Capital Mortgage, and Contractor agrees to carry out all assigned duties in a competent manner. Capital Mortgage agrees that it will not assign duties, the performance of which would be considered outside the customs and practices for the mortgage bank industry. Contractor recognizes and acknowledges that he is a salaried Contractor, and as such is not entitled to overtime pay for any additional hours that Contractor may work in excess of 40 hours per week.

4. **Compensation.** As base compensation for services rendered or to be rendered to Capital Mortgage during the term of this Agreement, Contractor shall be paid compensation of \$ 60,000 payable in an appropriate amount first and fifteenth day of each month. Increases to this Base Compensation will be made from time to time based on Contractor's performance. Capital Mortgage reserves the right to change the frequency of pay and/or alter the day that a net paycheck shall be written. Contractor is encouraged to promote new business opportunities for Capital Mortgage. As a result, Additional Compensation based on Contractor's performance and production are described on the attached Exhibit "A",

5. **Additional Benefits.** In addition to the compensation set forth in the immediately preceding paragraph, Capital Mortgage shall agree to allow Contractor the ability to draw each month which shall be against future earnings. Access to this draw will be for the first 6 months from the Effective Date of this Agreement. Additionally, Capital Mortgage will sponsor Contractor as required with the Department of Savings and Mortgage Lending to obtain a Mortgage Lending License or any other designation required for Contractor to perform his duties as **National Director of Retail Sales.** Additionally, Capital Mortgage will provide Contractor access to major medical insurance coverage which will become available to Contractor after his 90th day of engagement or as may be specified by the Insurance Provider. The terms and conditions of such coverage will be established at the sole discretion of the insurance provider and so long as that coverage is available to Capital Mortgage under reasonable and customary terms and conditions. If Contractor elects to obtain such coverage shall so notify Capital Mortgage and following the probationary period set forth by the insurance provider. Premiums for this coverage will be paid in its entirety by Contractor.

6. **Training.** Contractor will be provided access to continued training as may be required. This training will be conducted in-house on a regular but infrequent basis which shall include "Webinars" and other forms of training conducted online and in media. Formal seminars will be selected periodically and shall be made available to Contractor with the expenses of tuition and travel to be the expense of Capital Mortgage.

Engagement Agreement - Berthelette
Page 3 of 5

7. **Office Facilities.** Capital Mortgage shall provide Contractor with adequate electronic support necessary to perform Contractor's duties and responsibilities in servicing mortgage loans.

8. **Contractor Handbook.** Contractor acknowledges that he has received a copy of the Company's Contractor Handbook. This Contractor Handbook describes particular conditions of general engagement with Capital Mortgage. Included therein is a description of the Company's policy regarding vacation pay and sick leave. Contractor agrees to read this Contractor Handbook and will comply with the provisions of his engagement as are described therein.

9. **Termination.**

A) Capital Mortgage may for cause, terminate Contractor immediately, at its sole discretion. The following events shall be deemed "for cause":

- 1) If Contractor is insubordinate, or refuses, or is unable to discharge his usual duties or responsibilities; or
- 2) If Contractor, by reason other than illness, injury or permitted vacation, should absent himself from his duties without the consent of Capital Mortgage for more than two (2) consecutive business days or for more than a total of five (5) business days in any one calendar month; or
- 3) If Contractor shall breach any of the duties usually and customarily owed by an Contractor to employer including but not limited to misappropriation of funds or property, attempting to secure any personal profit not fairly disclosed to Capital Mortgage, neglect of duties undertaken by Contractor hereunder or engaging in conduct, publicly or privately, that is materially adverse to the interest of Capital Mortgage in the sole discretion of the officers of Capital Mortgage.
- 4) If Contractor is engaged in self dealing whereby profits are redirected from Capital Mortgage to personally benefit Contractor.
- 5) If Contractor's conduct causes any criminal charges or complaints that would affect Capital Mortgage's ability to maintain bond and E&O coverage.
- 6) If the Contractor's conduct causes or results in unrecoverable financial losses to Capital Mortgage in amounts in excess of \$5,000 per occasion or \$10,000 in an aggregate amount within one year.

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Engagement Agreement - Berthelette
Page 4 of 5

- B) Capital Mortgage may terminate Contractor without cause with at least 14 days notice of such termination.
- C) During the term of this Agreement and under the terms thereof, Contractor may terminate voluntarily his engagement under this Agreement on Sixty (60) days prior written notice. Contractor covenants to work with Capital Mortgage in transitioning his duties or his work during such Sixty (60) day period.

10. Confidentiality Agreement: The parties agree that in reliance on Contractor's commitment to faithful and loyal service as described in this agreement, Capital Mortgage has already and/or intends to allow Contractor unfettered access to its confidential information including trade secrets, consultant training, client lists, investor lists, methods and manners of doing business and the like; all of which are considered proprietary assets of Capital Mortgage. In this regard, Contractor hereby commits to maintain all information obtained from or through Capital Mortgage in strictest confidence and shall make no disclosures of such information at any time or place. Furthermore, Contractor will receive as required, qualified instruction, as maybe required, on the process of performing as **National Director of Retail Sales** including training and experiences in Servicing matters, Portfolio pricing, and acquisition, and servicing transfers, as well as other knowledge and experience in mortgage banking protocol and Capital Mortgage will provide Contractor with the requisite training to hone the skills to serve as **National Director of Retail Sales** Capital Mortgage and Contractor agree the actual fair market value of this training is in excess of \$100,000.

11. Creation of Proprietary Assets: As a further inducement, the parties hereto both acknowledge that the relationships with Lenders and Correspondents, generated by Contractor in the course of performing his job as **National Director of Retail Sales** are each intended as permanent relationships of Capital Mortgage and Contractor will be compensated based on the viability of those new relationships. It is, therefore, agreed that in the event Contractor terminates his position with Capital Mortgage Services or in the event Contractor is terminated with or without cause, then Contractor agrees that he will not contact those relationships for any reason, including, but not limited to solicitation of their business for another lender, without Capital Mortgage's explicit written authority.

The parties agree that these relationships are a valuable asset of Capital Mortgage with a liquidated value not less than \$50,000 each. Should Contractor violate the terms of this Agreement, not to solicit relationships of Capital Mortgage then Capital Mortgage may, at its option, file suit against Contractor and seek a Temporary Restraining Order, Temporary Injunction, Permanent Injunction and/or monetary damages as well as any other relief to which it may be justly entitled at law or in equity, including attorneys fees and related costs.

Employment Agreement - Berthelette
Page 5 of 5

12. **Right to Reform as Required** If any part or all of the Non-Competition Paragraph of this Employment Agreement, as referenced above, should be deemed invalid under the laws as may now or then exist in the State of Texas, then this Non-Competition Agreement shall be reformed by a Court of competent jurisdiction to comply with the law as it may then exist when such suit may be filed so as to restrict Employees potential to compete with Capital Mortgage.

13. **Miscellaneous.** This Employment Agreement is not assignable. This Agreement shall be interpreted, governed, and construed in accordance with the laws of the State of Texas and is performable in Lubbock County, Texas. It further constitutes the entire Agreement, either oral or in writing, between Capital Mortgage and Employee and may be modified only by a writing signed by Capital Mortgage and Employee.

14. **Binding Agreement.** Employee acknowledges he has read this agreement, reviewed its provisions with legal counsel or has chosen not to so review the terms and conditions of this Agreement with legal counsel, and agrees to be bound by the terms and conditions hereof.

DATED this 14 day of July

BY:

Linda A. Lewis
Linda A. Lewis, President

Louis William (Bill) Berthelette

[Signature]
Employee

2473 LAKE Rd
Street Address

Ridgeway, S.C. 29130
City, State and Zip Code

LG-029



STATEMENT AND ACKNOWLEDGEMENT OF PROBATIONARY PERIOD AND AT-WILL EMPLOYMENT

An employee's first ninety (90) days of employment are on a trial basis and are considered a continuation of the employment selection process. The ninety (90) day probationary period provides Capital Mortgage Services of Texas an opportunity to observe and evaluate the capacity of the employee, which includes the employee's ability to satisfactorily perform the essential functions of his or her job; and to observe and evaluate the employee's work habits and conduct, including attendance and the employee's relationship with coworkers and superiors.

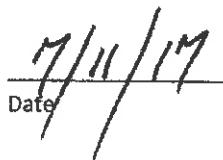
During this probationary period, Capital Mortgage Services of Texas may terminate employment immediately, with or without cause and with or without notice. Likewise, the employee may also terminate his or her employment with Capital Mortgage Services of Texas at any time, with or without notice and with or without cause. This 90 day probationary period is not a term of employment and is not intended, nor does it, impact the at will nature of the relationship between Capital Mortgage Services of Texas and the employee.

As an employee of Capital Mortgage Services of Texas, your employment has been and continues to be "at-will." This means that during the course of employment with Capital Mortgage Services of Texas, employees are free to terminate their employment with Capital Mortgage Services of Texas at any time, with or without a reason, and Capital Mortgage Services of Texas has the right to terminate employees at any time, with or without a reason. Although Capital Mortgage Services of Texas may choose to terminate an employee for cause, cause is not required.

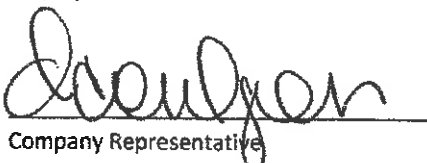
No one other than the CEO or President of Capital Mortgage Services of Texas has the authority to alter this at-will employment arrangement, to enter into an agreement for employment for a specified period of time, or to make any agreement contrary to this at-will arrangement. Furthermore, any such agreement must be in writing and must be signed by the President of Capital Mortgage Services of Texas.

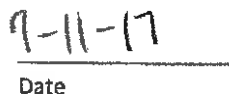
By signing in the space provided below, you hereby acknowledge that you have been given a copy of Capital Mortgage Services of Texas's Statement and Acknowledgement of At-Will Employment, that you have read the Statement and that you understand its contents, and that you further understand that the Statement supersedes any and all previous agreements, policies, practices or guidelines, whether oral or written.


Signature of Employee


Date

WILLIAM BERTHELETTE
Employee's Name - Printed


Company Representative


Date

LG-030



AGREEMENT: NONDISCLOSURE OF INFORMATION, ASSIGNMENTS AND COMPANY PROPRIETARY INFORMATION

As a condition to my employment with Capital Mortgage Services of Texas (hereinafter referred to as "the Company"):

I, **WILLIAM BERTHELETTE**, agree that:

- A. All inventions, ideas, and discoveries, whether or not patentable, conceived, or made by me (a) while in the employ of the Company or following termination of my employment, which relate to or constitute improvements on the Company's existing or contemplated products, components, ingredients, intermediates, formulae or data, or apparatuses, processes, techniques, or procedures employed in the production of same, or any improvements thereof, (b) during working hours, or (c) while utilizing facilities, materials, labor, or information of the Company, shall become the exclusive property of the Company.
- B. I will disclose promptly all such inventions, ideas, and discoveries to the Company, and on request of and at the expense of the Company will do all acts, sign all papers, make all rightful oaths, and give evidence and testimony necessary or desirable to perfect and maintain any patent assets and other rights on any or all such inventions, ideas, or discoveries.
- C. I will assign, without further compensation to me but at the expense of the Company, my entire right, title, and interest in and to any and all such inventions, ideas, and discoveries to the Company.
- D. I will hold in secret, and not divulge to any non-Company personnel without first obtaining the express written authorization of the Company, private and proprietary information trade secrets, and know-how of both the Company and all customer proprietary information disclosed to the Company, which I may learn or comes into my possession through or in the course of my employment with the Company.
- E. Nothing herein will prevent me, after my employment terminates, from using skills and knowledge of general nature gained while I am employed by the Company.

I will perform services for Capital Mortgage Services of Texas which may require Capital Mortgage Services of Texas to disclose confidential and proprietary information ("Confidential Information") to me. (Confidential Information is any information of any kind, nature, or description concerning any matters affecting or relating to Employee's services for Capital Mortgage Services of Texas, the business or operations of Capital Mortgage Services of Texas, and/or the products, drawings, plans, processes, or other data of Capital Mortgage Services of Texas). Accordingly, to protect the Capital Mortgage Services of Texas Confidential Information that will be disclosed to me, I agree as follows:

- A. I will hold the Confidential Information received from Capital Mortgage Services of Texas in strict confidence and shall exercise a reasonable degree of care to prevent disclosure to others.
- B. I will not disclose or divulge either directly or indirectly the Confidential Information to others unless first authorized to do so in writing by Capital Mortgage Services of Texas.
- C. I will not reproduce the Confidential Information nor use this information commercially or for any purpose other than the performance of his/her duties for Capital Mortgage Services of Texas.
- D. I will, upon the request or upon termination of my relationship with Capital Mortgage Services of Texas, deliver to Capital Mortgage Services of Texas any drawings, notes, documents, equipment, and materials received from Capital Mortgage Services of Texas or originating from its activities for Capital Mortgage Services of Texas.



- E. Capital Mortgage Services of Texas shall have the sole right to determine the treatment of any information that is part or project specific received from me, including the right to keep the same as a trade secret, to use and disclose the same without prior patent applications, to file copyright registrations in its own name or to follow any other procedure as Capital Mortgage Services of Texas may deem appropriate.
- F. Capital Mortgage Services of Texas reserves the right to take disciplinary action, up to and including termination for violations of this agreement. I represent and warrant that it is not under any preexisting obligations inconsistent with the provisions of this Agreement.

A handwritten signature in black ink, appearing to be 'William Berthelette', written over a horizontal line.

Signature of Employee

7/11/17
Date

WILLIAM BERTHELETTE

A handwritten signature in black ink, appearing to be 'L. Coulson', written over a horizontal line.

Company Representative

7-11-17
Date